Filed 1/2/19 P. v. Quarles CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. NIKKO JOVAR QUARLES, Defendant and Appellant.	D074466 (Super. Ct. No. RIF1500656) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on December 21, 2018, be modified as follows:

On page 1, the superior court case number in the heading is corrected so that it now reads: (Super. Ct. No. RIF1500656).

[There is no change in the judgment.]

McCONNELL, P. J.

Copies to: All parties

Filed 12/28/18 P. v. Quarles CA4/1 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. NIKKO JOVAR QUARLES, Defendant and Appellant.	D074466 (Super. Ct. No. RIF500656)

APPEAL from a judgment of the Superior Court of Riverside County, Irma Poole Asberry, Judge. Affirmed and remanded with directions.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Steve Oetting and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Nikko Jovar Quarles of second degree robbery (Pen. Code,[1] § 211; count 1) and being a felon in possession of a firearm (§ 29800, subd. (a)(1); count 2). It found true allegations that Quarles personally used a firearm in the commission of the count 1 robbery (§ 12022.53, subd. (b)). Quarles thereafter admitted he had suffered five prior prison terms (alleged as prior offenses 2 through 6; § 667.5, subd. (b)) and the trial court found true allegations he had suffered a sixth prior prison term (alleged as prior offense 7). The court sentenced Quarles to 18 years in state prison consisting of the lower term of two years, plus 10 years for the firearm enhancement, plus six years for the prior prison terms, and a two-year sentence on count 2, stayed under section 654.

Quarles contends the trial court improperly excluded admissible evidence, unduly restricted his cross-examination, and deprived him of his Sixth and Fourteenth Amendment rights to present a defense by ruling he could not admit evidence that the victim had a history of drug use, had been placed in rehabilitation, and had a prior relationship with Quarles, including shared drug use. He argues the evidence had strong probative value and was crucial to his defense, and thus the court's constitutional error was not harmless beyond a reasonable doubt. Quarles further contends the judgment must be reversed due to the court's failure to investigate or question jurors concerning events in the courthouse that assertedly caused juror bias, raising a presumption of

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1 Undesignated statutory references are to the Penal Code.

prejudice that was not rebutted. Quarles contends the cumulative effect of these federal constitutional errors requires reversal.

In supplemental briefing, Quarles contends that Senate Bill No. 620 (2017-2018 Reg. Sess.), effective January 1, 2018, applies and requires that his case be remanded to the trial court for resentencing to permit it to exercise its discretion to strike or dismiss the 10-year firearm enhancement imposed under section 12022.53. The People concede the point and agree Quarles's matter should be remanded for resentencing for this purpose. We will remand the matter for the trial court to resentence Quarles and consider whether to exercise its discretion to strike the section 12022.53 enhancement under the January 2018 amendment to that statute. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2015, Andres Nunez boarded a bus and encountered Quarles, who grabbed Nunez's phone and demanded everything else Nunez had on him. When Nunez refused, Quarles showed Nunez a black pistol that Quarles had stuck in his waistband, then took Nunez's hat, gym bag and money. Police officers responding to a robbery call located Quarles and saw him put Nunez's phone inside a trash can. After police detained Quarles and conducted a field identification, Nunez positively identified Quarles and Nunez's personal property. The police searched Quarles and the area around the bus stop where they found Quarles, but did not find a weapon.

DISCUSSION

I. *Claim of Improper Exclusion of Evidence and Restriction of Right to Cross-Examine Witnesses or Present Defense*

A. *Background*

Before trial, the trial court began by summarizing a chambers conference it had conducted with counsel regarding trial logistics. One of the items was defense counsel's request—apparently based on matters related by defense counsel to the court—to admit evidence that Nunez had a prior arrest and was presently in rehabilitation, and also to be permitted to question Nunez about a prior relationship between him and Quarles and their shared drug use. The trial court initially agreed that Quarles's counsel could question Nunez as to whether he had a prior relationship with Quarles and whether they used drugs together, but excluded the remaining matters under Evidence Code section 352 as not having any bearing on credibility or bias.[2]

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2 The court stated in part: "[Defense counsel] had information that they not only knew each other, but had shared drugs in the past. I understand that it's defense's position that defendant did not use a gun; that the defendant, in taking items from Mr. Nunez, was taking what he believed he was owed with regard to some prior dealings the two of them had. I indicated that I did think that this evidence regarding their prior relationship was relevant to bias, as to whether or not Mr. Nunez was manufacturing a story with regard to use of the firearm. I do find that it is relevant for the jury to be able to make credibility determinations that it must in doing its work, and for that reason, I would allow that information; however, information that Mr. Nunez is presently in rehab . . . . [¶] . . . [¶] that situation, I do think that it does not have any bearing on credibility. It certainly has no bearing on bias . . . so . . . I'm finding that this information is not only irrelevant, it

Upon further consideration and after reviewing a videotape of the incident on the bus, the court thereafter decided that any evidence that Nunez and Quarles had done drugs together or that Quarles had sold drugs to Nunez was not evidence of bias or prejudice on Nunez's part so as to support a conclusion that he was lying about the situation. The court allowed defense counsel to ask Nunez if he knew Quarles, but it observed all indications were that Nunez would testify he did not know Quarles, and thus it would not permit counsel to ask if Nunez ever did drugs with him.

The court gave a lengthy explanation of its ruling: "The defense is arguing that the history of drug involvement between Mr. Nunez and Mr. Quarles has some bearing as to Mr. Nunez's bias. The defense has told me . . . specifically that they had done drugs together in the past, that Mr. Quarles had even made some drug sales to Mr. Nunez, and that's the evidence that I have that deals with the point of bias. That evidence—the fact that they did allegedly do drugs together, that drugs were allegedly sold to Mr. Nunez—does not support that there would be bias on his part. Bias is a showing that this—that the witness would have some prejudice against or in favor, but in this particular instance, against the defendant that would cause this witness to—would support some tendency and reason to conclude that this witness is lying about the situation. The fact that they did drugs, the fact that there may have been sales, that in and of itself is not evidence that there is, in fact, bias on the part of this witness to lie about the situation. I certainly will leave the portion of my tentative that the witness, Mr. Nunez, can be asked if he knows

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doesn't have any tendency and reason to prove or disprove credibility or anything in nature of the present charges."

Mr. Quarles. That certainly is relevant. The information I have consistently has been that Mr. Nunez will report that he does not know Mr. Quarles.

"In looking at the video, observing the video, there is a long, long period of time that they are sitting in an area near each other on the bus. Mr. Nunez is not looking at Mr. Quarles, not having any contact with Mr. Quarles. In fact, the only time contact occurs is contact that is initiated by Mr. Quarles. The fact that there are verbal interactions between Mr. Quarles and Mr. Nunez is not indicative that . . . they are acquaintances of each other. . . . [I]f that argument was such, one would tend to believe that when—all that long period of time that they are sitting near each other on the bus—there's nothing that's blocking their view of each other—one would tend to believe that there would have been some acknowledgments or some acquaintances—that they're acquainted with each other, so looks at each other, head nods, hello, other conversation, but there is none of that, and to jump to the point that Mr. Nunez is trying to avoid contact with Mr. Quarles—if that were the case, it would appear that Mr. Nunez—we could speculate all day long about that. Mr. Nunez could get up and get off the bus. He could move to a different location—many, many other things—if he was trying to avoid having contact with Mr. Quarles, but the facts that we have don't give me any evidence of any bias that Mr. Nunez has against Mr. Quarles. That is the evidence that I have before me.

"I'm not going to allow the inquiry into did they use drugs together based on the fact that there's a statement of, 'No, I don't know him.' Now if there's a statement by the witness that, 'Yes, I know him,' Counsel, you all can ask that we do a sidebar so that we

can further address this point, but at this juncture, all of the evidence that I have is that Mr. Nunez has indicated he does not know and did not have prior contact with Mr. Quarles.

"The reason I'm not going to allow the area of inquiry as well, it's not only is it not probative, doesn't bear any tendency and reason to prove or disprove the issue for which it is being offered, that is to show bias to effect the credibility of this witness. To go into that area of inquiry without anything further—did you use drugs with him? Did you see him at the park and do drugs with him on more than one occasion? Did you all—did you sell drugs to him? Based on the fact that this witness has said no, going into those particular areas only serves to dirty up the complaining witness. It only goes to try to give what would be some [Evidence Code section] 1101 evidence that really is not what the Evidence Code would allow, because it's not getting to bias of this particular witness and giving some type of perjured testimony or manufactured testimony.

"To go into those areas is going to take time up that we don't need to take when it serves no useful purpose. It would not give the trier of fact any useful information, but serve to be confusing to the trier of fact. In fact, it would look like we are putting the complaining witness on trial. [¶] So it's for those reasons that I've made my ruling."

Nunez testified at trial that he had never met Quarles before, and did not know him. On cross-examination, Nunez denied that he was familiar with a specific park in

Corona, had ever seen Quarles at that park, or had ever spoken to Quarles. He was adamant that he had "never met the man in my life."[3]

B. *Legal Principles*

"We review a trial court's decision to admit or exclude evidence 'for abuse of discretion, and [the ruling] will not be disturbed unless there is a showing that the trial court acted in an arbitrary, capricious, or absurd manner resulting in a miscarriage of justice.' " (*People v. Powell* (2018) 5 Cal.5th 921, 951.) The court's broad discretion extends to determining the relevance of evidence and in assessing whether its prejudicial effect outweighs its probative value. (*People v. Anderson* (2018) 5 Cal.5th 372, 402.)

When relevance and admissibility of evidence depends on the existence of a preliminary fact, the defendant, as the proponent of the evidence, bears the burden of producing direct or circumstantial evidence in support of that preliminary fact. (*People v. Brooks* (2017) 3 Cal.5th 1, 46, 47.) For example, "[w]hen . . . the evidence at issue concerns the 'conduct of a particular person and the preliminary fact is whether that person . . . so conducted [herself],' the evidence is inadmissible 'unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact.' (Evid. Code, § 403, subd. (a)(4).) We have explained that the trial court's role with regard to preliminary fact questions under Evidence Code section 403, subdivision (a),

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3 Defense counsel asked Nunez whether Quarles told him he would get his possessions back if Nunez paid him. Nunez responded: "There's no payment, ma'am. I don't know the guy. I never did, never in existence, never prior to this . . . . I never met the man in my life. Never, never, never. . . . I have never met the man in my life. There's no hood ties. There's no gang ties. There's no hanging out. There's no dating my sister. There's nothing. There's nothing."

' "is merely to determine whether there is evidence sufficient to permit a jury to decide the question." ' [Citation.] The determination regarding the sufficiency of the foundational evidence is a matter left to the court's discretion. [Citation.] Such determinations will not be disturbed on appeal unless an abuse of discretion is shown." (*Id*. at pp. 46-47.)

C. *Analysis*

Quarles contends the court improperly precluded him from presenting "crucial" evidence demonstrating Nunez was biased against him, and impeaching Nunez's testimony that he displayed a gun during the bus incident. Quarles argues: "As the only issue in this case was whether Nunez's version of the incident was credible, appellant had a constitutional right to present the evidence of Nunez's prior contacts with appellant, their shared drug use, and Nunez's drug history in his own defense, and the trial court erred in excluding it." Quarles further contends his ability to cross-examine Nunez on these issues "would have significantly altered the jury's impression of Nunez's credibility" and the court's ruling improperly violated his fundamental right to cross-examine witnesses.

These contentions fail initially for the absence of any direct or circumstantial evidence of the preliminary fact underlying all of these inquiries, namely that Nunez knew Quarles and had some kind of past relationship with him. It was Quarles's burden to present evidence that he and Nunez were acquainted in some way (*People v. Brooks*, *supra*, 3 Cal.5th at p. 46), and no such testimony was elicited at trial, either from Nunez or any other person. To the contrary, Nunez denied in no uncertain terms knowing or

meeting Quarles before the incident, or having any involvement with him personally or via his family member. And, Quarles's counsel had every opportunity to cross-examine Nunez on these preliminary facts and did so, asking him whether he had ever met Quarles at a specific park or spoken with him.

Even assuming such evidence existed, we see nothing absurd, arbitrary, or unreasonable in the court's conclusion that Nunez's drug use or drug sales with Quarles would not tend to prove or disprove Nunez's credibility or bias concerning Quarles's possession of a weapon. Under these circumstances, the trial court did not abuse its discretion in excluding the proffered evidence of Nunez's shared drug use with Quarles or Nunez's supposed drug history. Because the application of the ordinary rules of evidence in this way does not impermissibly infringe on Quarles's right to present a defense (*People v. Ghobrial* (2018) 5 Cal.5th 250, 283), we reject Quarles's contention that the court denied him that fundamental right, or the right to cross-examine Nunez.

II. *Denial of New Trial Based on Claim of Unfair Trial/Juror Bias*

A. *Background*

Following his conviction, Quarles moved for a new trial, claiming in part he was deprived of his right to a fair trial after an incident in which jurors observed multiple sheriff's deputies run into the courtroom where Quarles was being tried, after which the trial court did not poll the jury to determine whether they had been prejudiced by the incident.

Quarles presented a declaration from his counsel, who stated that on or about May 26, 2016, after the jury was selected and the alternate jurors were sworn, she was

informed by the court clerk that the court had called sheriff's deputies to her courtroom using a panic button, causing the deputies to rush into the courtroom past the jury while the jury was present in the hallway outside the courtroom. Counsel averred that Quarles was the only defendant in the courtroom on May 25, 2016, to May 27, 2016. She stated she believed the jury was prejudiced by the fact armed deputies ran into the courtroom and that her client may not have received a fair trial as a result of the judge using the panic button. Counsel further stated that the jury was not polled about the incident; the trial court did not make any reference to the incident during the trial to her, Quarles or the prosecutor; and she was not informed of the matter until after Quarles's conviction.

Quarles also submitted a private investigator's report of unsworn statements made by a sheriff's deputy and the court clerk on the matter. The deputy related that on or about May 25, 2016, he had raised his voice with Quarles while inside a courtroom prisoner holding area outside the presence of the jury and judge. The deputy stated the incident lasted only one minute and it was not reportable; he was merely giving instructions to Quarles, who was shackled with his arms around his waist, and the judge apparently overheard this and punched the emergency alarm, causing two or three deputies to unnecessarily come to his aid. The deputy stated there were no other prisoners or witnesses, nor any need for physical compliance.

The court clerk stated she was outside the department speaking to the jurors after they were sworn in when suddenly two or three deputies came rushing past them and entered the courtroom. She stated she stepped out of the way as they went straight into the department. According to the clerk, she and the jurors were all " 'taken back by it a

little bit' " wondering what was going on, so she "played it down" and kept calmly talking to the jurors as if nothing had happened. No jurors asked about it and she did not make a big deal about it. The clerk did not see any manhandling of Quarles or hear any yelling, and when she got back into the courtroom, whatever had happened was completely under control. She related that the deputies must have used some other exit because they did not pass by her when they left.

The trial court denied the new trial motion based on the courthouse incident with the deputies. In part, it reasoned it had no evidence Quarles was prejudiced, stating: "From the moving documents, the statement is that jurors were present outside. We don't know how many or who. We have no idea what those individuals actually observed. Certainly, we don't know what they thought at all.

"We have some statements that were offered in the form of what purportedly the courtroom clerk and the deputy at the time—their observations. Those statements are hearsay, at best.

"There is no evidence that would support that the jury knew any reason why the deputies came in the courtroom. They don't know whether they came in to get access to another part of the courthouse. They don't know whether they came in as part of a drill that was taking place in the courthouse. They don't know whether they came in because there was some type of a medical emergency or any number of reasons.

"And both the statements that have been given by defense in their moving documents and arguments, statements by even the prosecution today and in the

prosecution documents, those are assumptions. We don't know. But there is no evidence of any kind that supports that Mr. Quarles was prejudiced in any way.

"What I do know and have is that the jury was instructed not to consider anything that happened outside the courtroom. The jury was given those instructions by way of [CALCRIM Nos.] 200 and 222. And specifically, [CALCRIM No.] 222 did describe for the jurors what their duties were and what is, in fact, evidence that they were to consider in making their determinations.

"So on grounds that there was some kind of tainting of the jurors with respect to some incident wherein deputies were called into the courtroom, on that ground, I am denying the defense request [for a new trial]."

B. *Legal Principles and Review Standard*

"A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' " (*People v. Davis* (1995) 10 Cal.4th 463, 524; see also *People v. Williams* (1997) 16 Cal.4th 635, 686.)

"Criminal defendants have a constitutional right to trial by unbiased, impartial jurors. [Citations.] An impartial jury is one in which no juror has been improperly influenced, and every juror is capable and willing to decide the case based solely on the evidence. [Citation.] 'Juror bias does not require that a juror bear animosity towards the defendant. Rather, juror bias exists if there is a substantial likelihood that a juror's verdict

was based on an improper outside influence, rather than on the evidence and instructions presented at trial, and the nature of the influence was detrimental to the defendant.' [Citation.] 'A sitting juror's involuntary exposure to events outside the trial evidence . . . may require . . . examination for probable prejudice. Such situations may include attempts by nonjurors to tamper with the jury, as by bribery or intimidation.' [Citation.] 'Because a defendant charged with crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citation.] '[A] nonjuror's tampering contact or communication with a sitting juror, usually raises a rebuttable "presumption" of prejudice.' [Citation.] To determine whether the verdict must be overturned, we apply the substantial likelihood test, an objective standard. [Citation.] 'Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant.' [Citation.] We accept the trial court's credibility determinations and findings on questions of historical fact if they are supported by substantial evidence. [Citation.] The question of prejudice, however, is a mixed question of law and fact subject to our independent determination." (*People v. Pettie* (2017) 16 Cal.App.5th 23, 78-79.)

On a defendant's claim that a trial court failed adequately to investigate a possibility of juror bias, the California Supreme Court has explained that " 'not every incident involving a juror's conduct requires or warrants further investigation.' [Citation.]

'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial. [¶] . . . [A] hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case.' " (*People v. Manibusan* (2013) 58 Cal.4th 40, 53; see also *People v. Sanchez* (2016) 63 Cal.4th 411, 459; *People v. Fuiava* (2012) 53 Cal.4th 622, 702.)

C. *Analysis*

Here, Quarles contends, as the defendant did in *People v. Manibusan*, *supra*, 58 Cal.4th 40, that the trial court failed to investigate and question the jurors about the incident involving the courtroom where his trial was taking place. He maintains jurors would have "logically inferred" his disruptive behavior was the reason the deputies charged into the courtroom, prejudicing them against him, thus triggering an obligation on the trial judge to hold a hearing and poll them to determine whether or not there was prejudice. He maintains the court's failure to do this requires reversal.

Quarles has not shown the incident was one that would give rise to a presumption of prejudice, or cause the trial court to conclude there was " 'good cause' to doubt [the jurors'] ability to perform [their] duties" to render an impartial and unbiased verdict. (*People v. Manibusan, supra,* 58 Cal.4th at p. 53.) The courthouse incident was not akin to jury misconduct, improper influence, or jury tampering that would give rise to a

presumption of prejudice. But even if such a presumption arose, on this record and under the circumstances, Quarles has not shown a "reasonable probability of prejudice, i.e., [a] *substantial likelihood* that one or more jurors were actually biased against" Quarles. (*People v. Pettie, supra*, 16 Cal.App.5th at p. 79; see also *In re Manriquez* (2018) 5 Cal.5th 785, 798.) Even accepting Quarles's private investigator's report relating the statement of the deputy and the court clerk, there is no indication any juror heard or observed the actual incident between the deputy and Quarles, which took place not in the courtroom but in a holding area, nor any evidence jurors were aware the trial judge pressed an alarm as a result. There is no support for Quarles's speculation that the jurors would have concluded he was the reason the deputies rushed into the courtroom. (Accord, *People v. Fuiava, supra*, 53 Cal.4th at p. 703 [record lacked support for defendant's speculation that other jurors were unsettled by gestures of court spectators, or that any other juror even saw the alleged gestures].) As the trial court observed, such conduct could have been the result of a drill, a medical emergency, or numerous other unrelated things.

Further, the court instructed the jury that it was to decide the case "based only on the evidence that has been presented to you in this trial." It instructed jurors that they "must disregard anything you saw or heard when court was not in session, even if it was done or said by one of the parties or witnesses." These instructions, which we presume the jury followed (see *People v. Anderson, supra*, 5 Cal.5th at p. 419; *People v. Lopez* (2018) 5 Cal.5th 339, 360), tend to dispel any possibility of prejudice. There is no indication these instructions were ineffective.

It is not the law that the trial court must "conduct an inquiry whenever it becomes aware of any indication of a possibility that there might be good cause to remove a juror" or jurors for bias. (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 703.) We conclude Quarles's assertions do not establish the trial court abused its discretion in electing to not poll the jurors or further investigate the matter following the courthouse incident involving the deputies. Accordingly, Quarles has not shown the court abused its discretion by denying him a new trial.

III. *Claim of Cumulative Error*

Having concluded the trial court did not err, there is no basis for Quarles's claim that the cumulative effect of the errors requires reversal.

IV. *Senate Bill No. 620*

When the court sentenced Quarles in April 2017, it was prohibited under former section 12022.53 from striking or dismissing his firearm enhancement. (See *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079.) While this case was pending on appeal, the Governor signed into law Senate Bill No. 620, which as of January 1, 2018, amended section 12022.53 to give trial courts discretion to strike or dismiss in the interest of justice the formerly mandatory firearm enhancement. (See § 12022.53, subd. (h); Stats. 2017, ch. 682, § 2; *People v. Rodriquez* (2018) 4 Cal.5th 1123, 1132; *Billingsley*, 22 Cal.App.5th at pp. 1079-1080.) The statute now states: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Quarles now asks us to remand his case for resentencing under this provision. The People concede the point, and we accept the concession that Senate Bill No. 620 applies retroactively such that the trial court must consider on remand whether to strike or dismiss Quarles's 10-year firearm enhancement. When a court proceeds with sentencing on the erroneous assumption it lacks discretion, remand is necessary so that the court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. (*People v. Lee* (2017) 16 Cal.App.5th 861, 866; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) " 'Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' " (*People v. Lee*, at p. 866; *People v. Brown*, at p. 1228.) Here, the court at the time of sentencing had no discretion to consider whether to strike or dismiss Quarles's section 12022.53, subdivision (h) firearm enhancement, and thus it should be given the opportunity to determine whether under the facts and circumstances of this case such action would be in furtherance of justice under section 1385. We remand for the court to resentence Quarles and make that determination in doing so.

DISPOSITION

The matter is remanded for the sole purpose of allowing the trial court to resentence Nikko Jovan Quarles and in doing so, exercise its discretion under section

12022.53, subdivision (h) by deciding whether to strike or dismiss Quarles's firearm enhancement on count 1. In all other respects the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.